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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 465

ROBERT B. HONEYMAN, APPELLANT,

vs.

DAVID B. JACOBS AND MARY V. JACOBS

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED NOVEMBER 8, 1938.

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[fol. a] **IN COURT OF APPEALS OF NEW YORK**

Witness the Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

ROBERT B. HONEYMAN, Appellant,
ag'st

ALMA CLAIRE CLARK, Ind., &c., Impld. With DAVID B. JACOBS, & Ors., Respondents

REMITTITUR—October 19, 1938

Be it Remembered, That on the 26th day of September, in the year of our Lord one thousand nine hundred and thirty-eight, Robert B. Honeyman, the appellant in this cause, came here unto the Court of Appeals by David R. J. Arnold, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Supreme Court. And David B. Jacobs & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Sobel & Brand, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this [fol. b] cause argued by Mr. Robert B. Honeyman, of counsel for the appellant, and no appearance having been made by counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Supreme Court appealed from herein be and the same hereby is affirmed without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS,

Clerk's Office

Albany, October 19, 1938.

I, Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 1] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

ROBERT B. HONEYMAN, Plaintiff-Appellant,
against

ALMA CLAIRE CLARK, Individually, and as Executrix under the Last Will and Testament of Annie E. Poth, Deceased;
David B. Jacobs, Mary V. Jacobs, His Wife, et al., Defendants-Respondents

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please take notice that the plaintiff hereby appeals to the Court of Appeals of the State of New York from the judgment or order of the Supreme Court of the State of New York, County of Queens, duly entered and filed in the Office of the Clerk of the County of Queens on the 7th day of September, 1938, finally determining that in a foreclosure action plaintiff is not entitled to judgment for the deficiency reported by the Referee, or any judgment for deficiency by [fol. 2] reason of the fact that the value of the property is equal to the amount of the debt due plaintiff, and that under § 1083-a of the Civil Practice Act the plaintiff is deemed paid as matter of law; the § 1083-a being held to be constitutional. The only question involved on the appeal is

the validity of a statutory provision of the State of New York, under the Constitution of the United States.

Dated, New York, September 14th, 1938.

Yours, etc., David R. J. Arnold, Attorney for Plaintiff, No. 61 Broadway, Borough of Manhattan, New York City.

To The Clerk of the Supreme Court of the State of New York, County of Queens. Sobel & Brand, Esqs., Attorneys for Defendants Jacobs.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

Present: Hon. Charles C. Lockwood, Justice.

ROBERT B. HONEYMAN, Plaintiff,
against

ALMA CLAIRE CLARK, Individually, and as Executrix under the Last Will and Testament of Annie E. Poth, Deceased; David B. Jacobs, Mary V. Jacobs, His Wife, et al., Defendants

ORDER APPEALED FROM—September 2, 1938

The above named plaintiff having moved this Court, by Notice of Motion dated June 2nd, 1938, for an order confirming the report of Edward T. Shannon, Referee, and directing a deficiency judgment to be entered herein in favor of the plaintiff and against the defendants, David B. Jacobs and Mary V. Jacobs, in the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590.00), the amount of the deficiency as reported by the said Referee in and by his report, with interest, and the said motion having duly [fol. 4] and regularly come on before this Court to be heard on June 10th, 1938, and the plaintiff in person having appeared in support of the said motion, and Sobel & Brand, Esqs., attorneys for the defendants, David B. Jacobs and Mary V. Jacobs, by Stanley R. Wayne, of counsel, having appeared in opposition thereto, and the sole question raised by the parties hereto on this application being the constitutionality of Section 1083-a of the Civil Practice Act of the State of New York;

Now, on reading and filing the Notice of Motion, dated June 2nd, 1938, the affidavit of Robert B. Honeyman, duly sworn to June 2nd, 1938, and the report of the Referee, in support of said motion, and the affidavit of David B. Jacobs, duly sworn to June 7th, 1938, and the affidavit of Arthur Butler, duly sworn to June 7th, 1938, in opposition thereto, and the Court having rendered its decision, in writing, on the 22nd day of June, 1938;

Now, on motion of Sobel & Brand, attorneys for the defendants David B. Jacobs and Mary V. Jacobs, it is

Ordered that the motion to confirm the report of the Referee herein be and the same hereby is granted, and it is further

Ordered that the plaintiff's application for a deficiency judgment against the defendants David B. Jacobs and Mary V. Jacobs in the sum of Nine Thousand Five Hundred and Ninety (\$9,590.00) Dollars, being the amount of deficiency as reported by the Referee in his report, or in any other sum, [fol. 5] be and the same hereby is in all respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, which section is hereby held to be constitutional.

Enter.

C. C. L., J. S. C.

Entered 9-7-38.

IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same title]

NOTICE OF MOTION TO CONFIRM REFEREE'S REPORT OF SALE
AND FOR DEFICIENCY JUDGMENT

Please take notice that upon the Referee's Report of Sale herein dated May 24, 1938, and filed in the office of the Clerk of the County of Queens on the 26th day of May, 1938, a copy of which report has heretofore been served upon you, with notice of filing, and upon the proceedings heretofore had herein and upon the annexed affidavit of the plaintiff, verified the 2nd day of June, 1938, a motion will be made at a Special Term of this Court for the hearing of Motions to be

held in Justice's Chambers at the Chamber of Commerce Building, 89-31 161st Street, Jamaica, Queens County, New York, on the 10th day of June, 1938, at 10 o'clock A. M., [fol. 6] or as soon thereafter as counsel may be heard, for an order confirming the Referee's Report of Sale in this action in all respects, and also for an order directing a deficiency judgment to be entered herein in favor of the plaintiff and against the defendants, David B. Jacobs and Mary V. Jacobs, in the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590.), the amount of the deficiency as reported by the Referee in and by his said report, with interest thereon at 6% from May 24, 1938.

Dated, June 2, 1938.

Yours, etc., David R. J. Arnold, Plaintiff's Attorney,
61 Broadway, New York City, N. Y.

To Sobel & Brand, Esqs., Attorneys for Defendants,
David B. Jacobs and Mary V. Jacobs, 170 Broadway, New
York City, N. Y.

[fol. 7] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same title]

AFFIDAVIT OF ROBERT B. HONEYMAN, READ IN SUPPORT OF
MOTION

STATE, CITY AND COUNTY OF NEW YORK, ss:

Robert B. Honeyman, being duly sworn, deposes and says, that he is the plaintiff in the above entitled action.

That this action is founded upon a bond made, executed and delivered by David B. Jacobs and Mary V. Jacobs on the 4th day of February, 1928, to the Title Guarantee and Trust Co., a New York corporation, to secure the payment of the sum of Fifteen Thousand Dollars (\$15,000) on the 4th day of February, 1931, with interest at the rate of six per centum (6%) per annum, as collateral security for the payment of which said bond the said David B. Jacobs and Mary V. Jacobs executed and delivered a mortgage upon certain premises at the Southeast corner of Central Avenue and Seneca, or Beach 12th Street, Far Rockaway, Queens County, Long Island, New York.

That the complaint asks for foreclosure of said mortgage and the sale of the mortgaged premises and for judgment

for any deficiency against the said David B. Jacobs and Mary V. Jacobs.

That the summons and copy of the complaint were served upon the said David B. Jacobs and Mary V. Jacobs, and they duly appeared in the action by Sobel & Brand, their attorneys, 170 Broadway, Borough of Manhattan, New York City, New York, and demanded notice of all proceedings.

[fol. 8] That thereafter such proceedings were had that judgment of foreclosure and sale was duly entered, wherein it was provided; among other things, that plaintiff might apply in this action for leave to enter a deficiency judgment against the said defendants, David B. Jacobs and Mary V. Jacobs.

That, as appears from the Referee's Report of Sale filed in the Office of the Clerk of this Court on the 26th day of May, 1938, said mortgaged premises were duly sold by the Referee duly appointed for that purpose at public auction on the 19th day of May, 1938, in all respects in accordance with the statutes and practice of this Court, for the sum of Seventy-five Hundred Dollars (\$7500), that being the highest sum bidden therefor.

That the Referee, as appears from his report, paid out of the proceeds the sum of Six Hundred Sixty-three and 38/100 Dollars (\$663.38), taxes which were a lien at the time of the sale; and that out of said proceeds there were also paid or deducted or allowed the sum of One Hundred Dollars (\$100), the Referee's fees; One Hundred Twenty-seven and 40/100 Dollars (\$127.40), advertising said sale; and Two Hundred and Eighty-eight and 25/100 Dollars (\$288.25) costs, and Two Hundred Dollars (\$200) allowance, awarded to plaintiff by the judgment.

That the Referee thereafter duly made, executed and delivered to the purchaser a deed of conveyance of said premises and filed his report setting forth the disbursements and allowances paid by him under the authority of the judgment of foreclosure and sale, and reported that there was due to the plaintiff the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590), with interest from the date of his report, to wit, May 24, 1938, as a deficiency. Deponent asks that said Report be in all respects confirmed.

[fol. 9] Plaintiff alleges that under and in accordance with the law of his contract with the defendants, David B.

Jacobs and Mary V. Jacobs, he is entitled to a judgment against the said defendants, David B. Jacobs and Mary V. Jacobs, in the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590).

And plaintiff further alleges that by the laws of 1933, Chapter 794, and various other acts supplemental and amendatory thereto, the legislature of the State of New York has attempted to limit deficiency judgments in foreclosure by inserting in the Civil Practice Act new sections known as 1083a and 1083b. That such legislative acts constitute an unreasonable interference of the plaintiff's contract rights with the defendants, David B. Jacobs and Mary V. Jacobs, and are wholly unconstitutional and in violation of Article 1, Section 10, of the Constitution of the United States.

That plaintiff asks this Court for an order confirming the Referee's Report of Sale and directing the Clerk to enter judgment in favor of the plaintiff and against the defendants, David B. Jacobs and Mary V. Jacobs, in the sum of Nine Thousand Five Hundred and Ninety Dollars (\$9,590), with interest from the 24th day of May, 1938, at the rate of six per centum (6%) per annum, in accordance with the Referee's Report of Sale and the plaintiff's contractual rights.

Robt. B. Honeyman.

Sworn to before me this 2nd day of June, 1938.

M. K. Lotterer, Notary Public, New York County.

[fol. 10] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

[Same title]

REFEREE'S REPORT OF SALE

To the Supreme Court of the State of New York, County of Queens:

I, Edward T. Shannon, the Referee appointed by the judgment made and entered in this action bearing date the 21st day of April, 1938, to make the sale of the mortgaged

lands and premises therein particularly described, do respectfully report as follows:

First. That I caused due notice of the sale of the said lands and premises on the 19th day of May, 1938, at 12 o'clock noon, at the front steps of the Town Hall, Parsons Boulevard and Jamaica Avenue, Jamaica, Borough of Queens, City and State of New York, to be given and published according to law and the rules and practice of this Court, as will fully appear by the affidavits hereto annexed.

Second. That at the time and place for which the said sale was noticed as aforesaid, I attended in person, and, agreeably to such notice, offered the said mortgaged lands and premises for sale to the highest bidder, and sold the same to the plaintiff, Robert B. Honeyman, for the sum of Seventy-five hundred (\$7500.00) Dollars, that being the highest sum bidden therefor, and received from the purchaser in cash ten per cent of said sum.

Third. . . .

[fol. 11] Fourth. That I have allowed out of the said purchase money the sum of Six hundred and sixty-three and 38/100 (\$663.38) Dollars for taxes which were liens on the said mortgaged premises at the time of such sale, and for which receipts are hereto annexed.

Fifth. . . .

Sixth. That I have been paid by plaintiff and retained for my fees the sum of One hundred (\$100.00) Dollars.

Seventh. Plaintiff has disbursed for advertising expenses, as shown by bills hereto annexed, the sum of One hundred twenty-seven and 40/100 (\$127.40) Dollars.

Eighth. I have allowed to the attorney for the plaintiff the sum of Two hundred eighty-eight and 25/100 (\$288.25) Dollars for the costs and an additional allowance of Two hundred (\$200.00) Dollars awarded to the plaintiff by such judgment and for which a receipt is hereto annexed.

Ninth. . . .

Tenth. That I have made, executed and delivered to such purchaser a good and sufficient deed of conveyance for the said mortgaged premises so sold.

Eleventh. That there is due to the plaintiff a deficiency of Nine thousand five hundred ninety and 20/100 (\$9,590.00) Dollars, with interest from the date of this report.

[fol. 12] Annexed hereto and made a part of this my report is a statement showing the several items aforesaid and the mode of computation.

All of which is respectfully submitted.

Dated, New York, May 24, 1938.

Edward T. Shannon, Referee.

Statement

Amount due on bond and mortgage, as per judgment, and for insurance premium advanced		\$15,654.17
Interest to date (time of closing sale)		117.00
		<hr/>
		\$15,771.17
Amount of purchase money	\$7,500.00	
Paid for taxes	\$483.38	
Referee's fees	\$100.00	
Advertising expenses	\$127.40	
Plaintiff's costs and allowance	\$428.25	
		<hr/>
Total	1,319.03	
Balance being amount paid plaintiff on account of claim		6,180.97
		<hr/>
Deficiency		\$9,590.20

Dated, New York, May 24, 1938.

Edward T. Shannon, Referee.

[fol. 13] SUPREME COURT, QUEENS COUNTY

[Same title]

Received, May 24, 1938, from Edward T. Shannon, Esq., the Referee appointed by the judgment herein to make the sale of the premises therein described, the sum of Two hundred twenty-eight and 25/100 Dollars (\$228.25), in full for the costs awarded plaintiff by the said judgment, and also, an extra allowance of Two hundred (\$200.00) Dollars awarded therein.

David R. J. Arnold, Attorney for Plaintiff.

SUPREME COURT, COUNTY OF QUEENS

[Same title]

STATE OF NEW YORK,
County of Queens, ss:

Edward T. Shannon, being duly sworn, deposes and says:
That he is the Referee duly appointed herein to make the sale in the above entitled action and the officer who made such sale.

[fol. 14] That the above report of sale signed by him is in all respects true and correct, and said report and statement annexed thereto contain a true, accurate and complete report of the disposition of the proceeds of such sale.

Edward T. Shannon.

Sworn to before me this 24th day of May, 1938, John
J. Fox, Notary Public, Bronx County.

[fol. 15] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

ROBERT B. HONEYMAN, Plaintiff,
against

ALMA CLAIRE CLARK, Individually and as Executrix under the Last Will and Testament of Annie E. Poth, Deceased; David B. Jacobs, Mary V. Jacobs, His Wife; Louis H. Pink, Successor to George S. Van Schaick, Superintendent of Insurance of the State of New York, as Liquidator of the Equitable Casualty and Surety Company; "John Doe No. 1," "John Doe No. 2," Said Names Quoted Being Fictitious, the Persons Intended Being the Tenants, if Any, of the Premises Described in the Complaint, and Precious Metals Research Works, Inc., Defendants

SUMMONS

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a

notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, February 15, 1938.

David R. J. Arnold, Attorney for Plaintiff, Office & P. O. Address, 61 Broadway, Borough of Manhattan, New York City.

[fol. 16] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

[Same title]

COMPLAINT

The plaintiff, by his attorney, David R. J. Arnold, complaining of the defendants, alleges upon information and belief:

First. That on or about the 4th day of February, 1928, David B. Jacobs and Mary V. Jacobs, his wife, for the purpose of securing the payment to Title Guarantee and Trust Company, a domestic corporation, its successors or assigns, of the sum of Fifteen thousand (\$15,000.00) dollars, with interest thereon, executed and delivered to said Title Guarantee and Trust Company, their bond, bearing date on that day, and sealed with their seals, whereby, for the payment of said sum, they bound themselves, jointly and severally unto said Title Guarantee and Trust Company, its successors or assigns, in the said sum of Fifteen thousand (\$15,000.00) dollars, to be paid on the 4th day of February, 1931, with interest thereon to be computed from the 4th day of February, 1928, at the rate of six (6%) per centum per annum, and to be paid on the first day of July next ensuing the date hereof, and semi-annually thereafter.

Second. That as collateral security for the payment of said indebtedness, the said David B. Jacobs and Mary V. Jacobs, his wife, on the 4th day of February, 1928, executed, acknowledged and delivered, to the said Title Guarantee and Trust Company, a mortgage, whereby they

[fol. 17] granted, bargained and sold to said Title Guarantee and Trust Company, the following described premises:

. All that certain lot, piece or parcel of land, situate, lying and being at Far Rockaway in the Fifth Ward of the Borough of Queens, City of New York, County of Queens and State of New York, bounded and described as follows:

Beginning at the corner formed by the intersection of the Southerly Side of Central Avenue, known as Far Rockaway Boulevard, with the Easterly side of Seneca Street, known as Beach Twelfth Street, as said Central Avenue and Seneca Street are laid out on a certain map entitled, "Map of Property at Far Rockaway, 5th Ward, Borough of Queens, City of New York, Belonging to The Oak Knoll Co.," surveyed by E. W. & F. W. Conklin, City Surveyors, and filed in the Office of the Clerk of the County of Queens July 1903, and from said point of beginning running Southerly along said side of Seneca Street one hundred and ninety-eight feet, thence Easterly at right angles to Seneca Street eighty and forty-three one-hundredths feet, thence Northerly parallel with Oak Street, known as Beach Ninth Street, as said Oak Street is shown on the above recited map, sixty-three one-hundredths of a foot, thence Easterly at right angles to said side of Oak Street twenty-five feet, thence Northerly parallel with Oak Street one hundred and fifty feet, thence Westerly at right angles to Oak Street twenty-five feet, thence Northerly parallel with Oak Street eighty-two and ninety-five one-hundredths feet to the Southerly [fol. 18] side of Central Avenue, and thence Westerly along said side of Central Avenue forty-six and fifty-five one-hundredths feet to a point, and thence Westerly still along said side of Central Avenue twenty-one and forty one-hundredths feet to the corner, the point or place of beginning.

Together with all the right, title and interest of the said mortgagor, of, in and to Central Avenue and Seneca Street, lying in front of and adjoining said premises to the centre lines thereof.

Third. That the said mortgage was duly recorded in the office of the Register of the County of Queens, on the 7th day of February, 1928, in Liber 3304 of Mortgages, at page 437, and the mortgage recording tax was then and there duly paid to the Register.

Fourth. That the said mortgage contains the same condition as the bond, and in case of default of payment of said sum of money, or interest thereon, or any part thereof, the said Title Guarantee and Trust Company, its successors and assigns, was empowered to sell the mortgaged premises according to law.

Fifth. That the said bond and mortgage were thereafter and on or about the 3rd day of March, 1928, duly assigned by said Title Guarantee and Trust Company to Robert B. Honeyman, the plaintiff herein, by instrument in writing dated on that day, and recorded on the 29th day of January, 1934, in the office of the Register of the County of Queens, in Liber 4070 of Mortgages, at page 99; and that said [fol. 19] plaintiff, Robert B. Honeyman, ever since has been and now is the lawful owner and holder of said bond and mortgage.

Sixth. That on or about the 6th day of January, 1931, by agreement in writing, dated on that day, between Title Guarantee and Trust Company and David B. Jacobs and Mary V. Jacobs, his wife, said bond and mortgage, upon which there remained the entire principal sum of Fifteen thousand (\$15,000.00) dollars, and interest, was duly extended until the 4th day of February, 1934, with interest at the rate of six (6%) per centum per annum, to be computed from the first day of July, 1930, and to be paid semi-annually on the first days of January and July in each year, until the said principal sum shall be wholly paid.

Seventh. That thereafter and on or about the 23rd day of February, 1933, said David B. Jacobs, by deed dated and acknowledged on that day, and recorded in the office of the Register of the County of Queens, in Liber 3635 of Conveyances, at page 537, duly granted and conveyed the said mortgaged premises to Mary V. Jacobs, his wife, of the Borough and County of Queens, City and State of New York, subject, however, to the lien of the said mortgage, in the sum of Fifteen thousand (\$15,000.00) dollars, and interest thereon.

Eighth. That thereafter and on or about the 9th day of April, 1936, by deed dated and acknowledged on that day, and recorded in the office of the Register of the County of Queens in Liber 3805 of Conveyances, page 215, on the 17th

day of April, 1936, said mortgaged premises were duly [fol. 20] granted and conveyed by Eugene E. Fink, Referee, to Alma Claire Clark, as Executrix under the Last Will and Testament of Annie E. Poth, deceased, subject, however, to the lien of plaintiff's said first mortgage.

Ninth. That thereafter and on or about the 8th day of January, 1937, by deed dated and acknowledged on that day, and recorded in the office of the Register of the County of Queens on the 22nd day of January, 1937, in Liber 3859 of Conveyances, page 96, said Alma Claire Clark, as Executrix under the Last Will and Testament of Annie E. Poth, deceased, duly granted and conveyed said mortgaged premises to Alma Claire Clark, subject, however, to the lien of plaintiff's said mortgage. That the defendant Alma Claire Clark claims to be the owner in fee of said premises.

Tenth. That the said mortgage provides, among other things, as follows:

"4. That the whole of said principal sum shall become due at the option of the holder of this mortgage immediately after default in the payment of any installment of principal, or in the payment of interest for thirty days, or after default in the payment of any tax, water rate or assessment for thirty days."

"13. That the holder of this mortgage, in any action to foreclose it, shall be entitled (without notice and without regard to the adequacy of any security for the debt) to the appointment of a receiver of the rents and profits of said premises; and in the event of any default in paying said [fol. 21] principal or interest, such rents and profits are hereby assigned to the holder of this mortgage as further security for the payment of said indebtedness."

Eleventh. That the defendant Alma Claire Clark has failed to comply with the conditions of said bond and mortgage and extension agreement, by omitting to pay the installment of interest amounting to Three hundred and seventy-five (\$375.00) dollars, which, by the terms thereof, became due and payable on the first day of January, 1938, although more than thirty days have elapsed since said installment of interest became due and payable; likewise by failing and omitting to pay the following taxes, levied by the

City of New York, and which are liens on the mortgaged premises:

1937—Second half taxes

although notice of said default and demand for payment has been given to the said defendant, and more than thirty days has elapsed since said taxes became due and payable, and since demand for payment has been given.

That it was covenanted and agreed in and by said bond and mortgage that the mortgagors, their heirs and assigns, would keep the buildings on said mortgaged premises insured against loss by fire for the benefit of the mortgagee, his executors, administrators and assigns.

That said defendant Alma Claire Clark did not keep the premises insured against loss or damage by fire, and wholly neglected so to do, in the following respect, to wit: that the [fol. 22] policy covering the buildings on said premises, Policy No. 901692 of Scottish Union Insurance Company, expired on October 27, 1937; said policy was renewed and Policy No. F421085 of the same company was issued; this policy was subsequently cancelled by the company because of the defendant Alma Claire Clark's failure to pay the premium therefor; that in default of said defendant's keeping of the buildings so insured, the plaintiff, pursuant to the provisions of said bond and mortgage, on or about the 13th day of January, 1938, caused such insurance to be issued by Glens Falls Insurance Company, of Glens Falls, New York, for the term of three (3) years from January 13, 1938, in the sum of Fifteen thousand (\$15,000.00) dollars and paid therefor the premium of Seventy-five (\$75.00) dollars; that after demand duly made prior to the commencement of this action, the said defendant Alma Claire Clark has neglected and failed to repay to the plaintiff the premium so paid; and that such premium payment with interest thereon from the 15th day of February, 1938, is secured by said mortgage, and is now justly due and owing to the plaintiff from the said defendant.

The plaintiff has therefore elected, and does hereby elect that the entire principal sum of said bond and mortgage shall be and become due and payable, and there is accordingly due, to the plaintiff thereon, the sum of Fifteen thousand (\$15,000.00) dollars, with interest thereon, at the rate of five (5%) per centum per annum, from the first day of July, 1937.

Twelfth. That in order to protect the security of said bond and mortgage, it may be necessary for the plaintiff to [fol. 23] pay, during the pendency of this action, certain sums for taxes, assessments, water rates, insurance premiums and other disbursements necessary for the upkeep of the mortgaged premises, which sums, if any, when paid, will be added to the amount due on the aforesaid bond and mortgage and will be a charge against the proceeds of the sale.

Thirteenth. That the defendant, Precious Metals Research Works, Inc., is a domestic corporation.

Fourteenth. That the defendants have, or claim to have, some interest in or lien upon said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequent to the lien of the plaintiff's mortgage, and is subject and subordinate thereto.

Fifteenth. That no other action or proceeding has been brought at law or otherwise for the recovery of said sum secured by said bond and mortgage, or any part thereof, except that in the year 1936 an action was brought by plaintiff to foreclose said mortgage, which action was discontinued.

Wherefore, plaintiff demands judgment that the defendants and all persons claiming under them, subsequent to the commencement of this action and the filing of the notice of pendency thereof, may be forever barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises; that the said premises may be decreed to be sold according to law subject to covenants and restrictions contained in Liber 1307 of Conveyances, at pages 200, [fol. 24] 226 and 228, as modified by Liber 1359 of Conveyances, at page 478; that the amount due to the plaintiff on said bond and mortgage, and for the payment of fire insurance premiums with interest thereon from the date of payment, may be adjudged; that the moneys arising from the sale may be brought into Court; that the plaintiff may be paid the amount adjudged to be due to the plaintiff with interest to the time of such payment, together with the costs and disbursements of this action, and the expenses of said sale, so far as the amount of such money properly applicable thereto will pay the same; that the defendants, David B. Jacobs and Mary V. Jacobs, his wife, may be adjudged to

pay any deficiency which may remain after applying all of such money so applicable thereto, and that the plaintiff may have such other and different relief in the premises as shall be just and equitable.

David R. J. Arnold, Attorney for Plaintiff, Office & P. O. Address, 61 Broadway, Borough of Manhattan, New York City.

(Duly verified.)

[fol. 25] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same title]

NOTICE OF APPEARANCE AND DEMAND

SIR:

Please take notice that the defendants David B. Jacobs, Mary V. Jacobs appear in this action, and that the undersigned is retained as attorneys for them therein, and demand that a copy of all papers in this action except the summons and complaint be served on them at this office, number 170 Broadway, Borough of Manhattan, City of New York.

Dated, March 1st, 1938.

Yours, etc., Sobel & Brand, Attorneys for Defendants, David B. Jacobs and Mary V. Jacobs, Office & P. O. Address, 170 Broadway, Borough of Manhattan, City of New York.

To David R. J. Arnold, Esq., Attorney for Plaintiff, 61 Broadway, New York City.

[fol. 26] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same title]

JUDGMENT OF FORECLOSURE AND SALE—April 19, 1938

On the original summons and duly verified complaint and notice of pendency of this action, all filed in the office of the Clerk of the County of Queens on the 25th day of February,

1938, and on the affidavit of Emanuel Israel, sworn to February 16, 1938, and the affidavits of John S. Hoghland, sworn to March 23, 1938, showing due personal service of the summons and complaint on each and every necessary party defendant herein, and on the notices of appearance of the defendants, David B. Jacobs and Mary V. Jacobs, and Louis H. Pink, Successor to George S. Van Schaick, Superintendent of Insurance of the State of New York, as liquidator of the Equitable Casualty and Surety Company, more particularly referred to in the affidavit of regularity of plaintiff's attorney, David R. J. Arnold, sworn to March 28, 1938, and of said affidavit of regularity from which it appears to the satisfaction of this Court that this action is brought to foreclose a first mortgage on real property situate in the County of Queens, the whole amount of which, as alleged in the complaint, is now due and payable with interest thereon, as therein alleged; that each and every [fol. 27] necessary party defendant herein has been personally served with the said summons and complaint within the State of New York, more than twenty (20) days prior to March 28, 1938, the date on which said affidavit of regularity was sworn to; that no defendant has answered or made any motion raising an objection to the complaint and each defendant is in default for want of pleading, and this Court having duly made its order of reference, bearing date the 5th day of April, 1938, which order was duly filed herein in the office of the Clerk of the County of Queens on the 7th day of April, 1938, appointing Edward T. Shannon, Esq., as referee to compute the amount due the plaintiff, with interest to the date of his report, upon the bond and mortgage set forth in the complaint in this action, and to examine and report the situation of the mortgaged premises and whether the mortgaged premises can, in his opinion, be sold in parcels without material injury to the parties interested, and to state his reasons therefor, and if, in his opinion, a sale of the whole of said mortgaged premises in one parcel will be more beneficial to all the interests of all the parties concerned, and on the stipulation of Sobel & Brand, Esqs., attorneys for David B. Jacobs and Mary V. Jacobs, the only defendants entitled to notice of the hearing before said referee, waiving such notice, endorsed upon and filed with said referee's report, and said referee having made his report bearing date the 8th day of April, 1938, by

which report said referee reported that there was due to the plaintiff on April 8, 1938, the date of his said report, the sum of Fifteen thousand six hundred and fifty-four and 17/100 (\$15,654.17) dollars, for principal and interest, and [fol. 28] for fire insurance premium advanced by the plaintiff, and further reported that he had ascertained the situation of the mortgaged premises, and that they cannot be sold except in one parcel; that a sale of the whole premises is necessary and would be most beneficial to the parties, and said referee's report and testimony taken before him, having been duly filed herein on or about the 9th day of April, 1938, and the said Sobel & Brand, Esqs., attorneys for the defendants, David B. Jacobs and Mary V. Jacobs, the only defendants entitled to notice hereof, having waived such notice and consented to the entry of judgment of foreclosure and sale herein, as appears from their stipulation to the effect endorsed hereon, and the motion having come on to be heard, and the plaintiff having appeared in support thereof by David R. J. Arnold, his attorney, and no one having appeared in opposition thereto, and the Court having duly deliberated on the several matters and things hereinbefore recited;

Now on motion of David R. J. Arnold, plaintiff's attorney, it is

Ordered, adjudged and decreed, that the said report of the said referee be, and the same hereby is in all respects ratified and confirmed; and it is further

Ordered, adjudged and decreed, that the mortgaged premises described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount so found and reported due to the plaintiff for principal and interest, the expenses of the sale and the costs [fol. 29] of this action as provided by Sections 1082 and 1087 of the Civil Practice Act, and which may be sold separately without material injury to the parties interested, be sold in one parcel agreeably to the report of said referee at public auction, at the front steps of the Town Hall, Parsons Boulevard and Jamaica Avenue, Jamaica, in the Borough of Queens, City of New York, by and under the direction of Edward T. Shannon, Esq., who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale according to law and the rules of practice of this Court, in the The

Argus, and public notice of such sale pursuant to Section 986 of the Civil Practice Act, said notice of sale to contain a description of the property to be sold to conform in all respects with the description set forth in this judgment; and to provide that the premises be sold subject to covenants and restrictions contained in Liber 1307 of Conveyances, at pages 200, 226 and 228, as modified by Liber 1359 of Conveyances, at page 478; that the plaintiff or any party to this action may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed or deeds of the premises sold; that such referee on receiving the proceeds of sale forthwith pay therefrom the taxes, assessments and water rents which are or may become liens on the premises at the time of the sale, with such interest or penalties as may have lawfully accrued thereon to the date of payment. That said referee then deposit the balance of such proceeds of sale in the Bank of the Manhattan Company, in his name as referee, within five days after the same shall be received by him and be ascertainable, and shall thereafter make the following [fol. 30] payments, and his checks drawn for that purpose shall be paid by said depository:

First. His fees and commissions as referee on said sale herein as fixed by the Civil Practice Act, not exceeding, however, the sum of \$100.00.

Second. Advertising expenses as shown on the bills presented and certified by the said referee to be correct, and duplicate copies of which shall be left with said depository.

Third. Said referee shall also pay to the plaintiff the sum of \$228.25, adjudged to the plaintiff for his costs and disbursements in this action with interest thereon from the date hereof, together with an additional allowance of \$200.00 hereby awarded to the plaintiff in this action with interest thereon from the date of entry hereof; and also the sum of \$15,654.17, the said amount so reported due as aforesaid, with interest thereon from the date of said report, or as much thereof as the purchase money of the mortgaged premises will pay of the same.

Fourth. If such referee intends to apply for a further allowance for his fees he may leave upon deposit such amounts as will cover such additional allowance to await the further order of the Court thereon after application duly made.

That in case the plaintiff be the purchaser of said mortgaged premises at said sale, or in the event that the rights of the purchaser at said sale and the terms of sale under this judgment shall be assigned to and be acquired by the plaintiff, [fol. 31] and a valid assignment thereof filed with said referee, said referee shall not require the plaintiff to pay in cash the entire amount bid at said sale but shall execute and deliver to the plaintiff a deed or deeds of the premises sold upon the payment to said referee of the amounts specified above in items marked "First" and "Second"; and the amounts of the aforesaid taxes, assessments and water rents and interest or penalties thereon, or in lieu of the payment of said last mentioned amounts, upon filing with said referee receipts of the proper municipal authorities showing the payment thereof; that the balance of the amount bid, after deducting therefrom the aforesaid amounts paid by the plaintiff, for referee's fees, advertising expenses and taxes, assessments and water rents, shall be allowed to the plaintiff and applied by said referee upon the amounts due to the plaintiff as specified above in item marked "Third," that if, after so applying the balance of the amount bid, there shall be a surplus over and above the said amounts due to the plaintiff, the plaintiff shall pay to said referee upon delivery to him of said referee's deed, the amount of such surplus; that said referee on receiving said several amounts from the plaintiff shall forthwith pay therefrom said taxes, assessments, water rents and interest or penalties thereon, unless the same have already been paid, and shall then deposit the balance in said depository as hereinabove directed within five days after the same shall be received by him and be ascertained.

That said referee take the receipt of the plaintiff, or his attorney, for the amounts paid as hereinbefore directed in item marked "Third," and file it with his report of sale; [fol. 32] that the surplus moneys, if any, so deposited or so remaining on deposit shall be withdrawn only on the order of the Court, signed by a Justice of the Court; that the said referee make his report of such sale and file it with the Clerk of the County of Queens with all convenient speed; that if the proceeds of said sale be insufficient to pay the amount so reported due to the plaintiff, with the expenses of the sale, interest, cost and allowances as aforesaid, the said referee specify the amount of such deficiency in his report

of sale; that the plaintiff may apply in this action for leave to enter a deficiency judgment against the defendants, David B. Jacobs and Mary V. Jacobs, pursuant to the Civil Practice Act; and that the purchaser or purchasers at such sale be let into possession of the premises sold to them on production of the referee's deed or deeds of such premises; and it is still further

Ordered, adjudged and decreed, that each and every one of the defendants in this action, and all persons claiming under them or any or either of them after filing of said notice of the pendency of this action, be and they are forever barred and foreclosed of all right, title, interest, claim, lien and equity of redemption in and to said mortgaged premises and each and every part and parcel thereof. The following is a description of said mortgaged premises, hereinabove mentioned, and hereby directed to be sold:

All that certain lot, piece or parcel of land, situate, lying and being at Far Rockaway in the Fifth Ward of the Borough of Queens, City of New York, County of Queens and State of New York, bounded and described as follows:

[fol. 33] Beginning at the corner formed by the intersection of the Southerly Side of Central Avenue, known as Far Rockaway Boulevard, with the Easterly side of Seneca Street, known as Beach Twelfth Street, as said Central Avenue and Seneca Street are laid out on a certain map entitled, "Map of Property at Far Rockaway, 5th Ward, Borough of Queens, City of New York, Belonging to The Oak Knoll Co.," surveyed by E. W. & F. W. Conklin, City Surveyors, and filed in the Office of the Clerk of the County of Queens July 1903, and from said point of beginning running Southerly along said side of Seneca Street one hundred and ninety-eight feet, thence Easterly at right angles to Seneca Street eighty and forty-three one-hundredths feet, thence Northerly parallel with Oak Street, known as Beach Ninth Street, as said Oak Street is shown on the above recited map, sixty-three one-hundredths of a foot, thence Easterly at right angles to said side of Oak Street twenty-five feet, thence Northerly parallel with Oak Street one hundred and fifty feet, thence Westerly at right angles to Oak Street twenty-five feet, thence Northerly parallel with Oak Street eighty-two and ninety-five one-hundredths feet to the Southerly side of Central Avenue, and thence Westerly along said side of Central Avenue forty-six and fifty-five one-hun-

dredths feet to a point, and thence Westerly still along said side of Central Avenue twenty-one and forty one-hundredths feet to the corner, the point or place of beginning.

Together with all the right, title and interest of the said [fol. 34] mortgagor, of, in and to Central Avenue and Seneca Street, lying in front of and adjoining said premises to the center lines thereof.

Enter.

J. T. H., J. S. C.

Entered 4/21/38.

Fees: \$7.75.

IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

[Same Title]

AFFIDAVIT OF DAVID B. JACOBS, READ IN OPPOSITION TO MOTION

STATE OF NEW YORK,

County of Queens, ss:

David B. Jacobs, being duly sworn, deposes and says: That he is one of the defendants in the above entitled action.

That this affidavit is respectfully submitted on behalf of the defendant Mary V. Jacobs and your deponent in opposition to the plaintiff's motion for an order directing the deficiency judgment to be entered against said Mary V. Jacobs and your deponent in the sum of \$9,590.

Deponent has been advised and believes that the present application now before the Court is being pursued by the plaintiff upon the contractual liability as set forth in the bond heretofore executed by Mary V. Jacobs and your deponent as collateral security for the mortgage which has been foreclosed herein and not pursuant to the present provisions of the Civil Practice Act, namely, Section 1083 which became effective on April 7, 1938, and Section 1083a as amended by the Laws of 1937.

As the Court will note from a reading of the moving affidavit the original principal indebtedness of the plaintiff was \$15,000. Annexed hereto and made part of these opposing papers is the affidavit of Arthur Butler, a competent real estate appraiser, who states that in his opinion as such, the present market value of the property is \$25,318 which would leave an equity in favor of the plaintiff over and above any

sums due even were the Court to consider the full amount of the mortgage plus costs, interest and disbursements without giving credit for the amount received on the foreclosure sale. It is therefore respectfully submitted that under the present status as provided for in the foregoing sections of the Civil Practice Act, the plaintiff is not entitled to any deficiency judgment. This would be the fact if the plaintiff had proceeded in accordance with Section 1083 and Section 1083a of the Civil Practice Act which he has not done. It therefore follows, as deponent has been advised, that as a matter of law failure of the plaintiff to comply with the procedural requirements of the foregoing sections of the Civil Practice Act makes it incumbent upon this Court to deny this present application.

In so far as the plaintiff challenges the constitutionality of the present controlling sections of the Civil Practice Act dealing with deficiency judgments, the limitations thereon and judgments in actions on bonds, deponent has been advised [fol. 36] and believes that this question has been passed on by the Courts of this State as being constitutional in so far as the aforesaid sections, together with Section 1083B of the Civil Practice Act were passed for a limited period during a declared emergency and therefore do not violate either the State or the Federal constitution.

Deponent has been advised and believes that the question of the constitutionality of such sections has been passed on in the following cases:

Farmers' & Mechanics Savings Bank v. Eagle Building Co., 153 Mis. 554, 276 N. Y. S. 246.

Klinke v. Samuels, 264 N. Y. 144.

Wherefore, your deponent respectfully prays that an order issue from this Court denying the application of the plaintiff for a deficiency judgment in any amount against Mary V. Jacobs and your deponent and that said Mary V. Jacobs and your deponent have such other, further and different relief in the premises as to the Court may seem just and proper.

David B. Jacobs.

Sworn to before me this 7th day of June, 1938. W. W. Schleit, Notary Public. Queens County. Clk's No. 697.

[fol. 37] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

[Same title]

AFFIDAVIT OF ARTHUR BUTLER, READ IN OPPOSITION TO MOTION

STATE OF NEW YORK,

County of Queens; ss:

Arthur Butler, being duly sworn, deposes and says that he is a duly licensed real estate broker authorized to conduct a general real estate brokerage business in the State of New York and maintains an office for the conduct of his business at #2152 Mott Avenue, Far Rockaway, in the Borough of Queens, City and State of New York.

That your deponent has been continuously engaged in the business of buying and selling real property in Queens County since 1898.

That your deponent has bought and sold real property from Reis Park in Queens County to Valley Stream, Nassau County, which said district is commonly known as the Rockaways.

That your deponent has acted as appraiser for the Home Owners' Loan Corporation wherein he appraised upwards of three hundred (300) parcels of real property in the Rockaways.

That your deponent has acted as appraiser for various banks, mortgage companies, and other institutions and individuals, and on numerous occasions has testified in court for the purpose of establishing the value of various pieces of real property.

That your deponent has made an inspection of the property of which this action is the subject and begs to report such findings to this Court.

[fol. 38] The building is a three story house containing living room, dining room, kitchen, breakfast room, maid's room and bath, a music room foyer hall and two miscellaneous rooms on the first floor, on the second floor there are four (4) bedrooms and two (2) baths, on the third floor there are five (5) rooms and one (1) bath and a store room. The house is heated by vapor vacuum steam and there is a two-car brick garage on the premises which said garage has an asbestos roof. The foundation of the house is constructed out of concrete blocks and piers and has a series of brick

steps at the entrance. The first floor of the building is shingled and the second and third floors are stuccoed. The roof which is comparatively new is of asbestos. The leaders and gutters are of copper and the property is surrounded by sidewalks and concrete curbs.

There are eighteen (18) oak trees on the property and the property contains a vacant ground on Seneca Street of approximately sixty (60) feet by 105.43.

The property is well located, is approximately opposite the Russell Sage Memorial Church and Far Rockaway Boulevard is seventy-four (74) feet wide and Seneca Street or Beach 12th Street is forty (40) feet wide.

That your deponent's appraisal is predicated upon his knowledge of the value of various pieces of real property in and around Far Rockaway, New York, and is likewise predicated upon the following figures concerning construction costs and depreciation.

There are 69,435 *cubic* feet in the premises which at a reasonable cost of \$.25 per *cubic* foot would have cost Seventeen [fol. 39] Thousand Three Hundred Fifty-Eight and 00/100 Dollars (\$17,358.00) to build. Deducting from this figure approximately Forty (40%) per cent for depreciation or Six Thousand Nine Hundred Forty-Three and 00/100 Dollars (\$6,943.00), the present net value of the house today is Ten Thousand Four Hundred Fifteen Dollars (\$10,415.00), which, together with the value of the garage of Six Hundred Thirty-Six and 00/100 Dollars (\$636.00), makes a total valuation on the buildings of Eleven Thousand Fifty-One and 00/100 Dollars (\$11,051.00).

There are 19,023 square feet of property on the premises which, at a reasonable figure of Seventy-Five Cents (\$.75) per foot, would total Fourteen Thousand Two Hundred Sixty-Seven and 00/100 Dollars (\$14,267.00).

That your deponent submits that his experience in the aforesaid vicinity is such that a valuation of Seventy-Five Cents (\$.75) per square foot is fair and reasonable.

That the total present value of the aforesaid property in your deponent's opinion, adding together the value of the land and of the building, is Twenty-Five Thousand Three Hundred Eighteen and 00/100 Dollars (\$25,318.00).

Arthur Butler.

Sworn to before me this 7th day of June, 1938.
W. W. Schleit, Notary Public. Queens Co. Clk's
No. 697.

[fol. 40] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

OPINION OF JUDGE LOCKWOOD—June 22, 1938

Application to enter a deficiency judgment for \$9,590, the full amount due, not pursuant to the provisions of the Civil Practice Act, section 1083 et seq., but upon the theory that such sections are unconstitutional as violative of section 10, article 1, of the Constitution of the United States. In view of the decision of the Court of Appeals (*Honeyman v. H. H. H. H.*, 275 N. Y. 382; *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers Trust Co. v. Ardlea Corp'n*, 267 N. Y. 224), it is vain to present this contention at Special Term. Motion denied.

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated and agreed that the foregoing printed papers on appeal contain true and correct copies of the notice of appeal, the order appealed from, and all of the papers upon which the Court below acted in making said order appealed from, and of the whole thereof, now on file in the office of the Clerk of the County of Queens, and certification thereof by said Clerk is hereby waived.

Dated, New York, September 23rd, 1938.

David R. J. Arnold, Attorney for Plaintiff-Appellant.
Sobel & Brand, Attorneys for Defendants-Respondents Jacobs.

[fols. 41-43] Bond on appeal for \$500.00, approved, omitted in printing.

[fol. 44] Citation, in usual form, omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Robert B. Honeyman, the appellant in the above-entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York en-

tered upon the remittitur of the Court of Appeals of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from a final judgment dated the 26th day of October, 1938, of the Supreme Court of the State of New York, as prayed in said petition, and that the Clerk of the Supreme Court of the State of New York, in the County of Queens, shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and seal of said Court, [fol. 46] a true copy of the material parts of the record herein, which shall be designated by a praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It is Further Ordered that the said Appellant shall give a good and sufficient bond, in the sum of Five Hundred Dollars, that said appellant shall prosecute said appeal to effect and answer all costs, if he fails to make his plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated, 29th Oct., 1938.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 47] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, Robert B. Honeyman, respectfully shows:

That he is the appellant in the above entitled action.

That the action is brought to foreclose a mortgage upon real property, executed by the appellees, David B. Jacob

and Mary V. Jacobs, on the 4th day of February, 1928, to secure the payment of their bond in the sum of Fifteen Thousand Dollars (\$15,000), and to procure a judgment against said appellees for any deficiency which might exist after the sale and application of the proceeds. Judgment of foreclosure and sale was duly entered in April 1938, and the mortgaged premises duly sold in May 1938 for the sum of Seventy-five Hundred Dollars (\$7500). The Referee duly appointed to sell the property in his report of the sale duly reported that after the payment of taxes and expenses [fol. 48] that "there is due to the plaintiff a deficiency of Nine Thousand Five Hundred Ninety and 20/100 Dollars (\$9,590.20), with interest from the date of this report", and prior to the enactment of Section 1083-a of the Civil Practice Act plaintiff was entitled to a judgment for that deficiency.

In 1933, by Chapter 794 of the Laws of the State of New York, the Legislature added Section 1083-a to the Civil Practice Act, which section purports to limit or deny the right of appellant to a deficiency judgment by empowering the Court to determine the value of the mortgaged premises and to credit that value so determined upon the indebtedness due the mortgagee as a payment thereupon, regardless of the amount received upon the foreclosure sale thereof.

After the sale of the premises in question by the Referee as aforesaid, appellant moved for a judgment for deficiency, alleging the unconstitutionality of the provisions of Section 1083-a, and demanding judgment for the whole deficiency shown by the Referee's report. The appellees filed affidavits in opposition alleging a value of the property equal to the mortgage debt. The Court rendered its decision denying any judgment for deficiency to appellant and sustaining the constitutionality of Section 1083-a. In the final order or judgment entered thereupon the Court ordered and adjudged that the application for deficiency judgment "is in all respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, [fol. 49] which section is hereby held to be constitutional."

Appellant thereupon appealed to the Court of Appeals

directly under Section 588 of the Civil Practice Act, subdivision 3, which reads as follows:

"As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the Court."

And on such appeal the Court of Appeals has affirmed the constitutionality of Section 1083-a and the determination of the Special Term. The Remittitur of the Court of Appeals has been filed with the Clerk of the Supreme Court in Queens County and the judgment of the Court of Appeals made the judgment of the Supreme Court by judgment filed on the 26th day of October, 1938.

That the Court of Appeals is the highest Court of the State of New York in which a decision in this case can be had. That there is drawn in question the validity of a Statute on the ground that said Statute is repugnant to the Constitution and Laws of the United States, and the decision is in favor of the validity of said Statute notwithstanding your petitioner's contention that the Statute violates Article 1 of Section 10 of the Constitution of the United States.

And your petitioner alleges that in accordance with Section 237 of the Judicial Code of the United States this case is one in which a review could be had in the Supreme Court of the United States on a writ of error as a matter of right, under the legislation in force when the Act of January 31, 1938 was passed.

[fol. 50] In accordance with Section 237 of the Judicial Code and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows that this case is one in which a review can be had in the Supreme Court as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme

Court of the United States, as provided by the Rules of the said Supreme Court.

Copy of the opinion of the Court of Appeals is attached hereto and made a part of this petition.

Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of the State of New York to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of New York may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, County of Queens, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order may be made touching the security to be required of the petitioner, and that the bond tendered by the petitioner be approved.

Dated October 28th, 1938.

Robert B. Honeyman, Petitioner.

[fol. 51] IN COURT OF APPEALS OF NEW YORK

ROBERT B. HONEYMAN, Appellant,

vs.

ALMA CLAIRE CLARK, Individually, &c., and Others,
Defendants,

and

DAVID B. JACOBS and MARY V. JACOBS, His Wife, Respondents.

OPINION

PER CURIAM:

The plaintiff has brought an action for the foreclosure of a mortgage upon real property in Queens County, executed and delivered by the defendants, David B. Jacobs and Mary V. Jacobs, on the 4th day of February, 1928, to secure the payment of their bond in the sum of \$15,000. The plaintiff asks for a judgment of foreclosure and sale of the mortgaged premises and for judgment for any defi-

ciency which may arise upon such sale. Judgment of foreclosure and sale was entered in April, 1938, and the mortgaged premises were sold in May, 1938, to the plaintiff for the sum of \$7,500. The referee reported that after payment of taxes and expenses "there is due to the plaintiff a deficiency of \$9,590.21, with interest from the date of this report." Under the statute as it existed at the time the bond and mortgage were executed, the plaintiff would have been entitled to a judgment for that deficiency.

Sections 1083 a and b of the C. P. A. enacted thereafter purport to limit the right of the plaintiff to enter a deficiency judgment: The plaintiff, alleging "that such legislative acts constitute an unreasonable interference of the plaintiff's contract rights with the defendants, David B. Jacobs and Mary V. Jacobs, and are wholly unconstitutional and in violation of Article 1, Section 10 of the Constitution of the United States," has applied to the court for an order confirming the referee's report of sale and directing the clerk to enter in his favor judgment against the said defendants in the sum of \$9,500. The plaintiff appeals to this court from an order of Special Term which provides that the application for a deficiency judgment "is in all respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, which section is hereby held to be constitutional." The appeal is taken direct to this court pursuant to the provisions of Section 588, subdivision 3, C. P. A., and the only question which may be considered on this appeal is the validity of Section 1083-a under the Constitution of the United States. We have, in other cases, sustained its validity. (*Honeyman v. Hanan*, 275 N. Y. 382; *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers Trust Co. v. Ardlea Corp.*, 267 N. Y. 224).

Order affirmed without costs.

[fol. 52½] Service of a copy of the within Order and Petition admitted this 31st day of October, 1938.

Sobel & Brand, Attorneys for Appellees.

[fol. 53] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is Hereby Stipulated by counsel for both sides in the above cause that the Clerk, in making up the transcript, shall follow the papers and records as shown in the transcript on file in the Court of Appeals and in the Supreme Court of the State of New York making the judgment of the Court of Appeals the judgment of said Supreme Court, together with the papers filed by the authority of Rule 12 of the Supreme Court of the United States, without omission or addition.

Dated, October 31, 1938.

David R. J. Arnold, Attorney for Appellant. Sobel
& Brand, Attorneys for Appellees.

[fol. 54] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The appellant assigns the following errors in the record and proceedings in this case:

1. The State Court erred in holding that Section 1083-a of the Civil Practice Act, enacted by the Legislature of the State of New York by Chapter 794 of the Laws of 1933, does not violate the provisions of Article 1 of Section 10 of the Constitution of the United States.

2. The State Court erred in holding that the Legislature of the State of New York may validly enact that a Court of the State may in foreclosure proceedings determine the value of the mortgaged premises and that the mortgagee must accept such valuation as a credit or payment upon the mortgage debt, which debt was created and existed before the passage of the Act of the Legislature.

3. The State Court erred in not holding that Section 1083-a is an unreasonable violation of appellant's contract

[fol. 55] rights, without any proter ion of said rights or due consideration thereof and without ompensation.

4. Chapter 794 of the Laws of 1933 of the State of New York is a law impairing the obligation of contracts made before the enactment of such law, in that it impairs the rights of the holders of contract obligations secured by mortgage to enforce the same and takes from such creditors their contractual right of enforcement and recovery except to the extent of the limited remedy provided by such statute, which is a partial remedy only and less in value or extent than the contractual obligation; such impairment of the contractual rights of creditors and of the contractual obligation of debtors is in contravention of the provision of Article 1, Section 10, of the Constitution of the United States that no state shall pass any law impairing the obligation of contracts, and the State Court erred in holding that such statute was a valid exercise of legislative power by the State of New York and available to defeat appellant's recovery of judgment in accordance with the contract obligation.

Wherefore, on account of the errors hereinbefore assigned, appeallant prays that the judgment and order of the Court of Appeals and of the Supreme Court of the State of New York, entered thereupon in the above entitled case on the 26th day of October, 1938, be reversed and judgment directed to be entered in favor of the appeal-nt.

Dated, October 29th, 1938.

David R. J. Arnold, Attorney for Appellant.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 56] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

[Title omitted]

ORDER ON REMITTITUR—October 25, 1938

The above named plaintiff having appealed to the Court of Appeals from the judgment or order of the Supreme Court entered and filed in the Office of the Clerk of the County of Queens on the 7th day of September, 1938, under the provisions of Section 588, Subdivision 3, of the Civil

Practice Act, and the said Court of Appeals having heard said appeal and having ordered and adjudged that the judgment and order of the Supreme Court, Queens County, be affirmed, and having ordered that the record of said appeal, and the proceedings therein, be remitted to the Supreme Court, according to the form of the statute in such case made and provided, to be enforced according to law;

Now, on motion of Sobel & Brand, attorneys for the defendants, David B. Jacobs and Mary V. Jacobs, it is

Ordered that the said judgment of the Court of Appeals be and the same hereby is made the judgment of the Supreme Court.

Enter.

Steinbirsch, J. S. C.

[fol. 57] IN SUPREME COURT OF NEW YORK, COUNTY OF
QUEENS

ROBERT B. HONEYMAN, Plaintiff,

VS.

ALMA CLAIRE CLARK, Individually and as Executrix under the Last Will and Testament of Annie E. Poth, Deceased; David B. Jacobs, Mary V. Jacobs, His Wife, et al., Defendants

JUDGMENT ON REMITTITUR

A judgment or order in favor of the defendants, David B. Jacobs and Mary V. Jacobs, having been entered in this Court on the 7th day of September, 1938, denying a deficiency judgment to the plaintiff; and the plaintiff having appealed directly to the Court of Appeals under the provisions of Subdivision 3 of Section 588 of the Civil Practice Act; and the Court of Appeals having sent hither its remittitur, by which it appears that the Court of Appeals has affirmed said judgment or final order, without costs, and has remitted its judgment to this Court to be enforced according to law; and this Court having by an order duly entered herein on this 26th day of October, 1938, ordered that the said judgment of the Court of Appeals be made the judgment of this Court;

On motion of Sobel & Brand, attorneys for the defendants, David B. Jacobs and Mary V. Jacobs, it is

Ordered and Adjudged that the judgment or order of this Court entered herein on the 7th day of September, 1938, denying any deficiency judgment to the plaintiff, be and the same is hereby in all things affirmed without costs.

Dated, October 26th, 1938.

Paul Livoti, Clerk.

Signed Judgment Entered Oct. 26, 1938, at 9.25 A. M.

Paul Livoti, Clerk.

[fol. 58] UNITED STATES SUPREME COURT

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
AS TO PRINTING RECORD—Filed November 12, 1938

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated, New York, November 10th, 1938.

David R. J. Arnold, Solicitor for Appellant.


[fol. 59] Service of a copy of the within Statement admitted this 10th day of November, 1938.

Sobel & Brand, Attys. for Appellees.

[fol. 60] [File endorsement omitted.]

Endorsed on cover: File No. 42,950. New York Supreme Court. Term No. 465. Robert B. Honeyman, appellant, vs. David B. Jacobs and Mary V. Jacobs. Filed November 8, 1938. Term No. 465, O. T., 1938.

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